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SERVICE DATE – FEBRUARY 1, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-31 (Sub-No. 38)

CSX CORPORATION AND CSX TRANSPORTATION, INC.
–ADVERSE ABANDONMENT APPLICATION–
CANADIAN NATIONAL RAILWAY COMPANY AND
GRAND TRUNK WESTERN RAILROAD INC.

Decided: January 28, 2002

On April 24, 2001, CSX Corporation and CSX Transportation, Inc. (collectively, CSX or applicant) filed an application under 49 U.S.C. 10903 requesting that we find that the public convenience and necessity require or permit the adverse abandonment of 2,952 feet of trackage owned by Grand Truck Western Railroad Incorporated (GTW). CSX was granted a partial waiver of certain regulations dealing with notice and filing requirements by a decision served on March 2, 2001. Notice of the application being filed was served and published in the Federal Register on May 14, 2001 (66 FR 31845). GTW filed a protest to the application on June 11, 2001, to which CSX replied on June 25, 2001. Subsequently, the parties filed letters updating the record. We will grant the abandonment application for the reasons discussed below.

BACKGROUND

The GTW trackage at issue is part of a longer rail line commonly referred to as Track No. 239 located near 43rd Street and Damen Avenue in Chicago, IL. Track 239 is situated on land owned by New York Central Lines, L.L.C. (NYC) but managed by CSX, which also controls NYC as discussed below. At its south end, Track No. 239 connects to CSX's new 59th Street intermodal facility; at its north end, Track No. 239 connects with Norfolk Southern (NS) trackage known as the Chicago Junction (CJ), over which GTW has trackage rights pursuant to an agreement with NYC/CSX. GTW's portion of Track No. 239 extends from milepost 26.4 to milepost 27.0¹ within a multi-track rail corridor paralleling Western Avenue on the west side of the city. While GTW owns the track, it leases the underlying real estate from NYC/CSX.

¹ The mileposts identified by CSX are the ones for the immediately adjacent line of the Baltimore & Ohio Chicago Terminal Railroad Company, a wholly owned CSX subsidiary. GTW states that the actual former Consolidated Rail Corporation (Conrail) milepost designations are milepost 306.15 on the south and milepost 306.73 on the north.

GTW leased the land and acquired the track materials (rails and ties) from Conrail in 1990, and granted trackage rights back to Conrail and to the Indiana Harbor Belt Railroad. Initially, GTW used the line as part of a through route to reach connections with other rail carriers and to forward and receive overhead traffic within the busy Chicago terminal. CSX claims that GTW no longer utilizes the line because it has shifted operations away from its nearby Railport intermodal facility. GTW responds that this traffic was either lost or rerouted due to shifting customer needs and market factors. In any event, it is uncontested that GTW does not currently handle traffic that requires the use of Track No. 239 or its CJ trackage rights, and has not done so since 1996.

CSX acquired control over the Conrail lease through an operating agreement with NYC as a result of CSX's acquisition of certain Conrail assets.² CSX submits that, to facilitate use of its new intermodal facility and relieve serious congestion on the Baltimore & Ohio Railroad Company (BOCT) mainline located west of Track No. 239, it sought to regain control over the line's track and right-of-way.³ According to CSX, it notified GTW by letter of its intent to terminate the lease pursuant to terms that allow for termination on 30 days' notice. GTW, CSX argues, refused to vacate the property, and CSX then filed a forcible entry and detainer action in the District Court for the Northern District of Illinois in May 2000. The Court held that it lacked jurisdiction to hear the dispute, given the Board's plenary and exclusive jurisdiction over the abandonment of lines of railroad. CSX Transportation, Inc. v. Canadian National Railway Co., et al., No. 00C 1462 (N.D. Ill. Aug 4, 2000). In order to permit it to assert its rights under the lease in state court, CSX now asks us to withdraw our primary jurisdiction over the line by making a finding, under 49 U.S.C. 10903, that the present or future public convenience and necessity require or permit the adverse abandonment of GTW's segment of Track No. 239.

During the pendency of the proceeding, the parties continued to negotiate over possible arrangements to end the dispute. The parties, however, have not reached an agreement.

² See CSX Corp. et al. – Control – Conrail, Inc. et. al., 3 STB 196, 221 (1998) (Conrail Merger Decision).

³ CSX explains that its trackage rights do not permit it to connect the line with its southern segment, to connect Track No. 239 to the BOCT mainline, or to use the track to achieve various efficiencies that its control thereover would offer.

PRELIMINARY MATTERS

On June 11, 2001, Canadian National Railway Company (CN), GTW's parent, filed a motion to be dismissed as a party to this proceeding.⁴ In support of the motion, CN included the verified statement of Mr. Paul E. Ladue, Regional Manager - U.S. Real Estate for Canadian National/Illinois Central, who indicated at 2 that "CN does not own or have other possessory interest in Track No. 239, does not conduct rail operations on Track No. 239 or elsewhere in the vicinity, and does not possess rights to conduct rail operations on Track No. 239, or elsewhere in the vicinity." In its response at 4, CSX indicates that it "does not oppose the motion to dismiss provided that CN agrees that it will not in the future change its position stated in these proceedings and claim an ownership or other possessory interest in Track No. 239 or the lease agreement dated August 21, 1990, such as to interfere with CSX's control of that Track in the event that CSX's adverse abandonment [application] is granted." The motion is unopposed and good cause has been shown to grant it. Accordingly, we will do so.

In its application, CSX requests an exemption under 49 U.S.C. 10502(a) from certain statutory provisions on the grounds that they are unnecessary to carry out the federal rail transportation policy (RTP) at 49 U.S.C. 10101, the matters are of limited scope, and regulation is not needed to protect shippers from an abuse of market power. Specifically, CSX seeks an exemption from: section 10903(a)(2)(C), which requires a statement concerning availability of the track for subsidy or sale for continuation of rail service; section 10904, under which offers of financial assistance can be made for the purchase of or subsidy for a rail line proposed for abandonment for continuation of rail service; and section 10905, which relates to offers for sale of abandoned rail properties for other public purposes.⁵

The exemption request meets the criteria of section 10502(a). The statutory provisions from which exemption is sought concern offers of financial assistance to enable continued rail service and public use conditions to use the property for other public purposes when rail service is no longer provided. Here, however, CSX does not seek to end service on the line, but, rather, seeks to remove our jurisdiction as a barrier to enforcing its lease under state law so that CSX can use the property for efficient rail service. Under these circumstances, an exemption is warranted and will be granted.

⁴ CN and GTW request that the motion to dismiss and GTW's protest be accepted as late-filed. CSX does not object, and the request will be granted.

⁵ CSX also initially requested an exemption from the statutory requirements at 49 U.S.C. 10903(a)(3) and 10903(c). However, because the Board had already granted, in a decision served March 2, 2001, CSX's previous request for waivers from certain corresponding Board regulations, that portion of the request was dismissed as moot in a notice served May 14, 2001.

Finally, we will waive on our own motion the notification of consummation requirement in 49 CFR 1152.24(f), as well as the 1-year limit on abandonment authorization in section 1152.29(e)(2). These requirements presume that applicant will have control over consummation, but this is not always true in an adverse abandonment situation, where the applicant usually must invoke state law to gain control of the property. See Salt Lake City Corporation – Adverse Abandonment – In Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) (STB served Oct. 4, 2001).

POSITIONS OF THE PARTIES

CSX asserts that abandonment will allow it to use the property at issue to improve intermodal service, ease traffic congestion and delays on the BOCT mainline, and permit improved access to its 59th Street intermodal facility, generally resulting in more fluid train service in the Chicago terminal area as contemplated in our Conrail Merger Decision. Applicant contends that its present inability to control and use the GTW line, due to protestant's refusal to allow for necessary physical changes,⁶ has resulted in numerous operational difficulties. Specifically, applicant states that CSX trains entering or exiting the 59th Street facility cause regular traffic delays that create a bottleneck on the BOCT mainline when they are required to hold but cannot clear the mainline.⁷ CSX claims that, with the exception of some shorter trains, its intermodal trains are currently unable to clear the BOCT mainline when they are forced to hold. CSX asserts that the availability of GTW's portion of Track No. 239, when joined with its own segment, would provide sufficient space to improve access for trains moving to and from the 59th Street facility and thus avoid delays on the busy BOCT corridor.

According to CSX, the congestion problems have become particularly acute and costly. It asserts that the BOCT mainline now typically experiences delays up to six times per day, resulting in cumulative delays of up to 3 to 4 hours a day. CSX claims that these delays impose significant costs on all of the carriers using the BOCT mainline, adversely affect the timeliness of deliveries to customers, and result in significant productivity losses, which are compounded when trains of several carriers are stacked up on the mainline for several hours daily.

⁶ See supra note 3.

⁷ CSX trains may be required to hold, for example, when there are yard activities that prevent the trains from entering the 59th Street facility or when a CSX train is ready to depart the facility but the connecting railroad to which CSX is going to deliver an intermodal train cannot immediately take the train.

Finally, CSX maintains that the abandonment will have no significant impact on GTW. It argues that GTW makes no current use of the line and, in any event, has alternative options, including trackage rights over Track No. 239 and over a newly constructed NS Track No. 237.⁸

In its protest, GTW asserts that, although it does not currently use the track at issue, it has not abandoned all operations in the vicinity of the line. Specifically, GTW states that it maintains a strong interest in the operational efficiency of the corridor because it serves the CN Cargo Flo bulk transfer facility at Railport, and because the line provides it with a critical link to other Chicago terminal carriers. It also asserts that NS operates regularly over the line pursuant to trackage rights retained by Conrail. Notwithstanding current traffic patterns, GTW anticipates actively using the line in the future. Protestant argues that Track No. 239 thus remains an active, well-maintained, strategic through-routing option and interchange connection for GTW in the Chicago terminal area.

GTW also claims that its only current access to its CJ trackage rights to the north is via Track 239 and, therefore, a forced abandonment here would also necessarily entail a discontinuance of its trackage rights on the CJ. Moreover, GTW challenges CSX's claim that reasonably accessible trackage rights on Track No. 237 are available. Protestant also questions the scope and severity of the congestion problem. It asserts that CSX's portion of Track No. 239, together with a recently constructed crossing to the BOCT mainline, enables CSX to hold intermodal trains completely off of the BOCT mainline.

Finally, GTW argues that Board intervention here, entwining the agency in complex joint facility arrangements, is unnecessary. Protestant indicates that it is agreeable to entering an agreement that meets CSX's needs. All that separates the parties, GTW maintains, is CSX's refusal to agree to a standard non-discrimination clause giving GTW meaningful access to the line.

In reply, CSX disputes GTW's claims that NS currently uses the line. Specifically, it contends that NS was using the line only to turn engines (not for revenue service), but that NS now has parallel Track No. 237 available to it for that purpose, and that, notably, NS does not oppose this application. CSX additionally argues that GTW does not now use Track No. 239 to serve the CN Cargo Flo bulk transfer facility at Railport. Applicant further contends that GTW's claim that the line provides a critical link to other Chicago terminal carriers is highly speculative,

⁸ Track No. 237 extends along the east side of Track No. 239 and, according to CSX, provides a route to the CJ at its north end.

vague, and unsupported.⁹ Finally, CSX disputes GTW's claims that traffic volumes in the terminal area have not increased, and that CSX already has all the lead track it needs.

DISCUSSION AND CONCLUSIONS

The statutory standard governing any application to abandon or discontinue service over a line is whether the present or future public convenience and necessity require or permit such an action. 49 U.S.C. 10903(e). In the case of an "adverse" abandonment proceeding – one brought by a party other than the carrier whose operating authority is at issue – our finding that the public convenience and necessity do not require or permit continued operation of the track by the carrier in question removes our exclusive and plenary jurisdiction as a regulatory obstacle to abandonment, thereby enabling the parties to undertake other legal remedies to effectively remove the carrier from that line. See Modern Handcraft, Inc.–Abandonment, 363 I.C.C. 969 (1981) (Modern Handcraft). Where no overriding federal interest exists, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of state law. See Chelsea Property Owners – Aban. – Portion of the Consol. Rail Corp., 8 I.C.C.2d 773 (1992), aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994). Thus, in this adverse abandonment proceeding, the primary question is whether removal of our jurisdiction as a shield against state law is in the public interest.

As the moving party here, CSX has the burden of proof. After considering the arguments and balancing the interests of all concerned, we conclude that CSX has presented credible evidence demonstrating that the adverse abandonment proposal meets the public convenience and necessity test. The function of our exclusive and plenary jurisdiction over an abandonment is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. Modern Handcraft, 363 I.C.C. at 972. Here, we conclude that the public is best served by granting the adverse abandonment application.

The evidence of record demonstrates that there is no GTW traffic moving over the line. No shippers have protested this application. Moreover, shippers will not lose routing options or have less efficient, more costly service if GTW is forced to abandon its trackage. To the contrary, abandonment by GTW will benefit the public, as it will result in improved rail service by CSX. The record indicates that CSX's ability, after abandonment, to connect the GTW line with its own segment of Track No. 239 will provide enough staging area to eliminate costly and time-consuming backups and delays on the BOCT mainline, improve access to CSX's 59th

⁹ In a letter filed October 10, 2001, CSX states that it understands that, within the last several weeks, a switch allowing GTW access to the CJ at the north end of Track No. 239 was removed. Absent restoration, applicant claims that GTW can no longer even physically connect to the subject line, making its claims of future need even more tenuous.

Street intermodal facility, result in improved intermodal service, and allow for more fluid and efficient rail operations in the Chicago terminal area as contemplated in the Conrail Merger Decision.

While the record demonstrates an immediate and pressing need by CSX for the GTW line, it also shows that GTW is making no current use of the line and, in fact, has not done so for several years. We note, however, that should GTW have a future need to use the line, it has options in the area available to it. CSX has made a number of trackage rights proposals to GTW for its use of Track No. 239 in that event.¹⁰ Thus, abandonment of the line will not, as GTW fears, effectively cut off that carrier's access to the CJ tracks over which it holds trackage rights.

In sum, we conclude that there is no overriding federal interest in GTW's continued lease of the line and that, as a result, our primary jurisdiction thereover should be removed as an obstacle to abandonment. Accordingly, CSX's abandonment application will be granted. CSX can present this decision to a court to demonstrate that there is no federal regulatory obstacle to enforcing the termination clause in its lease with GTW. Upon such enforcement, CSX will be able to gain control over, and use of, its property in the public interest.¹¹

Environmental Matters.

The Board's Section of Environmental Analysis (SEA), in an Environmental Assessment (EA) served on May 25, 2001, considered the environmental impacts of the proposed abandonment and found that it will not significantly affect the quality of the human environment. As such, SEA found that the environmental impact statement process is unnecessary in this case.

¹⁰ CSX has repeatedly stated during the course of this proceeding that it will assure GTW reasonable access to Track No. 239 via trackage rights. In fact, CSX has attached a proposed trackage rights agreement as an exhibit to its application, and has stated that it will accept, as a condition to the granting of this application, a grant of trackage rights to GTW under terms essentially the same as those set forth in the exhibit. CSX's most recent assurances to GTW are contained in a letter to the Board's Secretary filed July 19, 2001. Because of CSX's demonstrated immediate need to use the subject line and GTW's failure to assert any immediate need to do so, we will not delay CSX's use by conditioning it on the parties' agreeing to specific trackage rights provisions. GTW may seek relief before the Board in the event that CSX does not make good on its representations on the record that it will afford GTW reasonable access when and if GTW's needs require use of the line.

¹¹ As the operator of the assets allocated to NYC in the Conrail Merger Decision, CSX has operating authority over Track No. 239. Accordingly, CSX does not require further agency authority to operate the subject line.

SEA further concluded that no environmental conditions should be placed on any decision granting abandonment authority.

Labor Protection.

In approving this application, we must ensure that affected employees are adequately protected. See 49 U.S.C. 10903(b)(2). We have found that the conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), satisfy these statutory requirements, and they will be imposed here.

Other Matters.

SEA has indicated in its EA that the right-of-way may be suitable for other public use after abandonment. However, in view of our previous granting here of an exemption from section 10905, public use and trail use are not considerations in this proceeding. We also will not entertain any OFA requests.

We find:

1. The present or future public convenience and necessity require or permit the proposed adverse abandonment of GTW's portion of Track No. 239, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).
2. Abandonment of this line by GTW will not have a serious impact on rural and community development.
3. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CSX's adverse abandonment application is granted.
2. The motion to dismiss CN as a party to this proceeding is granted.
3. CSX's request for an exemption under 49 U.S.C. 10502(a) from the requirements of 49 U.S.C. 10903(a)(2)(C), 10904, and 10905 is granted, and the requirements of 49 CFR 1152.24(f) and 1152.29(e)(2) are waived.

4. This decision is effective March 3, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary